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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. [redacted] 61

TURNER DAIRY COMPANY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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Summary of Argument.

I.

(A) The Secretary of Agriculture never published, within Order No. 41 and its amendments, the price that would give milk a purchasing power equivalent to its purchasing power during the base period, and hence, the said Order and the amendments thereto are void 17

(B) The question whether the Agricultural Marketing Agreement Act of 1937 requires such price to be published within the Order is a judicial question in the first instance and cannot be determined, under the statute, by the Secretary of Agriculture 17

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Statutes and Orders Involved.

Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, U. S. C. A. Sec. 608a(6).

Milk Order No. 41, and amendments.

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TURNER DAIRY COMPANY,

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THE UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Turner Dairy Company, prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh District which was entered in this case between the above named parties on February 18, 1948, rehearing denied March 15, 1948.

STATEMENT OF MATTER INVOLVED.

The judgment of the Circuit Court of Appeals for the Seventh Circuit and its accompanying opinion appear in the case of *United States* v. *Turner Dairy Company*, 166 F. (2d) 1 (advance sheets). The United States of America filed a complaint against the defendant to compel compliance with Order No. 41, and its amendments, which regulate the handling of milk in the Chicago Marketing Area. The Court entered a summary judgment mandatorily commanding the defendant to comply with all of the provisions thereof and enjoined it from violating any of said provisions. No evidence was heard and the judgment was entered on the pleadings. The defendant appealed from that judgment to the Circuit Court of Appeals.

The complaint charges, after some historical allegations, that the Market Administrator is the duly appointed agent of the Secretary of Agriculture to administer the provisions of the said Order No. 41 as originally issued, and as subsequently amended (Tr. 3). The complaint charged in paragraph 6 that the defendant failed to report to the Market Administrator information regarding its receipts and utilization of milk from July 1941 to the date of complaint as required by Section 941.3 of Order No. 41 as amended; that the defendant owes the Market Administrator for the Producer-Settlement Fund established by Order No. 41, an undetermined sum of money, the amount of which would have to be determined from the reports when filed and an audit thereof; that the defendant owes the Market Administrator certain sums of money as its pro rata share of the expenses of administering Order No. 41 and also for marketing services, as provided by the Order (Tr. 3, 4).

The plaintiff prayed for a preliminary mandatory injunction commanding the defendant and its agents, to comply fully with the provisions of Order No. 41, and more particularly to file reports for each delivery period and to pay the Market Administrator all sums, found from such reports of the defendant to be due for the Producer-Settlement Fund, for administration expenses, and for marketing services. The plaintiff also prayed for a permanent injunction to restrain the defendant from violating any of the provisions of Order No. 41, as amended, and to mandatorily enjoin and command the defendant to file the reports heretofore referred to and to pay the aforesaid monies described in the prayer for a preliminary injunction (Tr. 4, 5).

The petitioner-defendant filed its answer to the complaint. The only defenses which were involved in the appeal to the Circuit Court of Appeals are as follows:

"SIXTH DEFENSE

"The aforesaid Order No. 41, and Order 41 as amended, are void, invalid, and illegal for failure to determine the purchasing power of milk in the pre-war period, August, 1909, to July 1914, in compliance with Sec. 2 (1) of the Agricultural Adjustment Act of 1937, it appearing from the records and previous orders of the Department of Agriculture that the said Department had sufficient available statistics concerning the purchasing power of milk during said period, August 1909 to July 1914, to designate the said period as the base in the aforesaid Orders, and it further appearing that the Secretary of Agriculture had heretofore designated the said period from August 1909 to July 1914 as the base period in the marketing agreement for evaporated milk, issued by the said Secretary on May 31, 1935." (Tr. 13).

"NINTH DEFENSE

"(1) The order, and each amendment thereto, are void and illegal in that they do not respectively contain a finding by the Secretary of Agriculture, prior to the issuance of the order, or modifying the same, that he has ascertained, in accordance with Sections 2 and 8e of the Marketing Agreement Act of 1937, the price that will give milk a purchasing power equivalent to its purchasing power in the base period.

"(2) The Secretary of Agriculture, at no time, ascertained said prices, but nevertheless made the illegal, void, and unauthorized findings set forth in paragraph numbered 2 of Section 941.0 of Order No. 41 and in each of the amendments thereto.

"(3) Order No. 41, and Order 41 as amended, are void in that the pretended finding of the Secretary of Agriculture in Section 941.0 'that the prices calculated to give milk produced for sale in said marketing area a purchasing power equivalent to the purchasing power of milk, as determined pursuant to Section 2a and 8e of said act, are not reasonable in view of the prices of feeds, the available supplies of feed, and other economic conditions which affect market supply and demand for such milk,' does not set forth and specify what are the 'other economic conditions which affect market supply and demand for such milk.' " (Tr. 14, 15).

"TENTH DEFENSE

"Order No. 41, and its amendments, are invalid in that the Secretary of Agriculture did not conduct any of the public hearings with respect to the said order and its amendments, nor did he take and hear the evidence at the said public hearings, but nevertheless, contrary to law, made the findings in the several orders, which are required to be made by the terms and provisions of the Agricultural Marketing Agreement Act of 1937; and because of his failure to conduct the said public hearings and make his findings from the evidence thereof, or to have the findings made, in accordance with law, the said Order No. 41, and its amendments, are void." (Tr. 15).

After issue was joined the Government moved for the entry of a preliminary injunction (Tr. 16). The defendant filed objections to the said motion for preliminary injunction, of which the following are the principal ones:

"2. It appears from the answer of the defendant that substantial and meritorious defenses are asserted to the complaint, and it is improper to issue a preliminary injunction prior to the disposition of the said defenses.

"(3). If certain of the defenses of the defendant are proved or sustained, the Court will be required to declare the invalidity of the Order, and none of the relief prayed for in the complaint can be allowed." (Tr. 18)

Apparently the Court treated this motion of the plaintiff as a motion for a summary judgment and required that briefs be filed by the parties (Tr. 69). Technically, the motion made was not one for summary judgment; it did not conform to the requirements of the Federal Rules of Civil Practice with respect to motions for summary judgment but Counsel for the petitioner are willing to, and do, waive any objections that they could make, or could have made, to the treatment of the motion for preliminary injunction as a motion for summary judgment.

A notice of motion was served on Counsel for the defendant that the plaintiff would present and move for the entry of findings of fact, conclusions of law and judgment in this matter (Tr. 20) and the defendant was ordered to file objections thereto within five days (Tr. 21). The findings of facts, conclusions of law and judgment submitted to Counsel with the notice are the same as those finally entered (Tr.23-27).

The objections filed by the petitioner to the submitted findings of fact, conclusions of law and judgment are:

"1. Conclusion No. 6 is improper in that the plaintiff is not entitled to a mandatory injunction commanding the defendant to pay to the Market Administrator such sums as defendant's reports and an audit of the defendant's books and records discloses to be due and owing to the Producer-Settlement Fund for

Administration Expenses and for Marketing Services, because such a mandatory injunction deprives the defendant of it's rights under Section 15a and 15b of the Agricultural Marketing Agreement Act of 1937, and of its common law remedies, and subjects the defendant to assert all its rights in response to a petition for a contempt rule.

2. Paragraph 1 of the Judgment Order submitted is improper in that the plaintiff is not entitled to a mandatory injunction commanding the defendant to pay to the Market Administrator such sums as defendant's reports and an audit of the defendant's books and records discloses to be due and owing to the Producer-Settlement Fund for Administration Expenses and for Marketing Services, because such a mandatory injunction deprives the defendant of its rights under Section 15A and 15B of the Agricultural Marketing Agreement Act of 1937 and of its common law remedies, and subjects the defendant to assert all its rights in response to a petition for a contempt rule.

3. Conclusion No. 7 is improper for the same reason set forth with respect to Conclusion No. 6.

4. Paragraph 2 of the Judgment Order is improper for the same reasons set forth in Objection No. 2 hereof.

5. Paragraph 2 of the Judgment Order is further improper in that the injunction restraining the defendant, its officers, agents, employees and assigns, from continuing to violate Order 41 as amended is vague and too broad and is not based upon any proper allegations of the complaint." (Tr. 20, 21, 22).

Among the findings of the Court, the following are involved in this proceeding:

"2. Order No. 41, as amended, is a valid regulation of the United States of America, issued in full compliance with the Agricultural Marketing Agreement Act of 1937.

3. The defendant's business of handling milk in the Chicago, Illinois, Marketing Area constituted the defendant a handler as such term is used in the Agri-

cultural Marketing Agreement Act of 1937, (7 U. S. C. 1940 ed. 608c (1)), and as such term is defined in Order No. 41, as amended.

4. This court has the power to enforce complete compliance with the Agricultural Marketing Agreement Act of 1937 and Order No. 31, as amended, including the enforcement of payment of such sums as are required to be paid under the terms of said order.

"5. The defendant by its failure to file the reports required by Section 941.3 or Order No. 41, as amended, for each delivery period since July 1, 1941, have violated said order and the Agricultural Marketing Agreement Act of 1937 pursuant to which the said order was issued.

"6. The plaintiff is entitled to a mandatory injunction commanding the defendant to file all reports required of handlers subject to Order No. 41, as amended, and commanding the defendant to pay to the Market Administrator such sums as said reports and an audit of the defendant's books and records for the purpose of verifying said reports, disclose to be due and owing for the producer-settlement fund, for administration expenses and for marketing services.

7. A permanent injunction should issue restraining the defendant from continuing to violate Order No. 41 by failing to file within the time prescribed by said order reports of its receipts and utilization of milk for each delivery period and by failing to pay to the Market Administrator the sums which such reports and audits of the defendant's books and records, for the purpose of verifying such reports, disclose to be due for the producer-settlement fund, for administration expenses, and for marketing services." (Tr. 23.26).

Judgment was entered on December 31, 1946, on the plaintiff's motion (which was treated as one for summary judgment) granting the plaintiff all of the relief prayed for by the plaintiff, as heretofore set forth (Tr. 26, 27).

Within apt time, appeal was made by the petitioner to the Circuit Court of Appeals for the Seventh Circuit. The

judgment was affirmed. The principal reason for affirmance was that the petitioner could not defend in the District Court a complaint such as was filed in the District Court against it, but was required to seek remedy of its grievances, and a review of the acts of the Secretary of Agriculture in connection with the provisions of Order No. 41, as amended, and its promulgation by a petition filed with the Secretary of Agriculture for that purpose under the provisions of Sec. 8c(15)(A). The Circuit Court of Appeals held that the remedy providing for administrative review was exclusive and thus answered the position and contention of the petitioner that, since the construction and interpretation of a statute was involved, it was within the exclusive province of the District Court to hear and determine the defense of the petitioner.

STATUTES AND ORDERS INVOLVED.

"The Agricultural Marketing Agreement Act of 1937, 7 U. S. C. A. 674, 50 Stat. 249.

"Sec. 2. It is hereby declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period; and, in the case of all commodities for which the base period is the prewar period, August 1909 to July 1914, will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the base period. The base period in the case of all agricultural commodities except tobacco and

potatoes shall be the prewar period, August 1909-July 1914. In the case of tobacco and potatoes, the base period shall be the postwar period, August 1919-July 1929.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

"Sec. 8e. In connection with the making of any marketing agreement or the issuance of any order, if the Secretary finds and proclaims that, as to any commodity specified in such marketing agreement or order, the purchasing power during the base period specified for such commodity in section 2 of this title cannot be satisfactorily determined from available statistics of the Department of Agriculture, the base period, for the purpose of such marketing agreement or order, shall be the post-war period, August 1919-July 1929, or all that portion thereof for which the Secretary finds and proclaims that the purchasing power of such commodity can be satisfactorily determined from available statistics of the Department of Agriculture.

"Sec. 8c(4). After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity."

"Sec. 8a(6). The several district courts of the United States are hereby vested with jurisdiction to enforce, and to prevent and restrain any person from

violating any order, regulation, or agreement, heretofore or hereafter issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts."

"Sec. 8c(15)(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

"(B) The District Courts of the United States (including the Supreme Court of the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill of equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires."

"8c(18) The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain, in accordance with section 2 and section 8e, the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices which it is

declared to be the policy of Congress to establish in section 2 and section 8e shall, for the purposes of such agreement, order, or amendment, be such level as will reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand, for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c, as the case may be, that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period as determined pursuant to section 2 and section 8e are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices."

The original Order No. 41 appears in 4 Fed. Reg. 3764; the amendments appear in 5 Fed. Reg. 2037; 6 Fed. Reg. 3130; 6 Fed. Reg. 4552; 8 Fed. Reg. 1258; 8 Fed. Reg. 5358; 8 Fed. Reg. 8294; 9 Fed. Reg. 3063. A stipulation was entered into between the parties by their counsel that the Clerk of the Circuit Court of Appeals for the Seventh Circuit in printing up the record in this case for that Court, may exclude therefrom the exhibits attached to the complaint and that the appellant shall furnish three copies thereof for the use of that Court. The exhibits attached to the complaint are Order No. 41 and the amendments thereto just referred to and cited constitute a voluminous and repetitious amount of material with which this Court should

not be burdened since no portion of the contents of those Orders are in dispute or involved in this proceeding. It is conceded that these Orders did not contain within themselves the finding, or the publication of an ascertainment by the Secretary of Agriculture, described in Sec. 8c(18) of the Act:

> "The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain, in accordance with section 2 and section 8e, the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period."

THE QUESTIONS PRESENTED.

1. Whether the District Courts of the United States have exclusive jurisdiction to construe and interpret a statute.

2. Whether an interpretation or construction of the provisions of the Marketing Agreement Act of 1937 must first be sought from the Secretary of Agriculture.

3. Whether the Marketing Agreement Act of 1937 required the parity price of milk to be published in Order No. 41, and its amendments.

4. Whether the failure to publish within the provisions of Order No. 41, and its amendments, which fixes the minimum price of milk for the Chicago Area, the parity price of milk, invalidated the said Order No. 41 and its amendments.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals for the Seventh Circuit has decided a Federal question in a way which is probably in conflict with applicable decisions of the Supreme Court of the United States: *U. S.* v. *Ruzicka,* 329 U. S. 287; *Stark* v. *Wickard,* 321 U. S. 288. It appears that the opinion of the Circuit Court of Appeals committed to the Secretary of Agriculture exclusive jurisdiction in the first instance to interpret and construe a statute.

2. The finding or conclusion of the Circuit Court of Appeals for the Seventh Circuit that it was not necessary to publish in Order No. 41, and its amendments, the parity price of milk, as directed by the Agricultural Market Agreement Act of 1937, is a matter which has not been, but should be, settled by the Supreme Court of the United States. This finding and conclusion of the Circuit Court of Appeals is probably in conflict with applicable decisions of this Court construing other statutes: *Panama Refining Co.* v. *Ryan,* 293 U. S. 388 and *Thomas Paper Stock Co.* v. *Porter,* 328 U. S. 50.

PRAYER FOR WRIT.

Wherefore, the Petitioner prays that a Writ of Certiorari issued by this Honorable Court to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit in the foregoing case of *United States* v. *Turner Dairy Company.*

TURNER DAIRY COMPANY,
Petitioner,

GEORGE F. CALLAGHAN,
Attorney for Petitioner.

MYER H. GLADSTONE,
RALPH J. GUTGSELL,
Of Counsel.

BRIEF IN SUPPORT OF THE PETITION.

Opinion Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (Tr. 39-48) is reported in the case, *United States* v. *Turner Dairy Company*, 166 F. (2d) 1, (Advance Sheets).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Section 347, Title 28, U. S. C. A.

The judgment of the Circuit Court of Appeals was entered on February 18, 1948 (Tr. 39); the petitioner filed a petition for rehearing on March 4, 1948 (Tr. 46); the plaintiff filed a petition for rehearing on March 4, 1948 (Tr. 46); on March 15, 1948, the Circuit Court of Appeals modified its opinion on the plaintiff's petition for rehearing (Tr. 47) and as so modified the judgment was affirmed (Tr. 48); the petition for certiorari and the record is due to be filed in the Supreme Court of the United States not later than June 13, 1948.

The Facts.

The facts are set out in the Petition and for the sake of brevity will not be repeated here.

Specifications of Errors to be Urged.

1. The Circuit Court of Appeals for the Seventh Circuit erred in affirming the judgment of the District Court.

2. The Circuit Court of Appeals erred in holding that the construction and interpretation of the provisions of the

Agricultural Marketing Agreement Act of 1937 must be determined by the Secretary of Agriculture in the first instance.

3. The Circuit Court of Appeals erred in holding that Order No. 41, and its amendments, regulating the marketing of milk in the Chicago Milk Marketing Area was not illegal and invalid.

ARGUMENT.

I.

(A) The Secretary of Agriculture never published, within Order No. 41 and its amendments, the price that would give milk a purchasing power equivalent to its purchasing power during the base period, and hence, the said Order and the amendments thereto are void.

(B) The question whether the Agricultural Marketing Agreement Act of 1937 requires such price to be published within the Order is a judicial question in the first instance and cannot be determined, under the statute, by the Secretary of Agriculture.

The Marketing Agreement Act of 1937 contains an amendment known as Section 8c (18), which provision is as follows:

> "The Secretary of Agriculture, *prior* to prescribing any term in the marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, *or prior to modifying the price* fixed in any such term, *shall ascertain* in accordance with section 2 and section 8e, the price that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices which it is declared to be the policy of Congress to establish in section 2 and section 8e shall, ~~for~~ the purpose of such agreement, order or amendment, be such level as will reflect the price of feeds, the available supply of feeds, and other economic conditions which affect supply and demand, for milk or its products in the marketing area in which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds,

> *upon the basis of the evidence* adduced at the hearing required by section 8b or 8c, as the case may be, that the prices that will give such commodities a purchasing power during the base period as determined pursuant to section 2 and section 8e are not reasonable in view of the price of feeds, the available supply of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such price as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices." (Italics ours.)

The Circuit Court of Appeals, in its opinion, stated:

> "Defendant insists that under these provisions it was the Secretary's duty to make a prior determination of the prices that would give milk a purchasing power equivalent to its purchasing power during the base period; that it was his statutory duty to set forth that price in the order and in each amendment thereto, and that the failure to include this price and to publish it invalidates the order." (Tr. 41)

The foregoing observation of the Circuit Court of Appeals is slightly inaccurate since the petitioner claims that in addition to the provision of Section 8c(18), the duty to include the findings within the order is found in Section 8c(4) of the Act, which reads as follows:

> "After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (*in addition to such other findings as may be specifically required by this section*) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity." (Underlining ours.)

The foregoing objections to the Government claim, to the Act and Order No. 41, were squarely presented to the District Court and with respect to this situation, the Court of Appeals observed:

> "It does not appear that the District Court considered in any way the premise that it was not endowed with jurisdiction to decide this issue in the enforcement action. Evidently the court proceeded on the theory that it had jurisdiction and decided that the order was not illegal because of anything urged. *The Government now suggests that the (fol. 43) issue of validity was not proper subject matter for the court's consideration.*" (Italics ours.) (Tr. 41).

The Appeals' Court then continued that the Government relied upon Sections 8c(15)(A) and (B) for its position. These Sections have heretofore been set forth under the heading of "Statutes and Orders involved."

The Appeals' Court relied upon the case of *U. S.* v. *Ruzicka*, 329 U. S. 287, involving the question and in holding that the petitioner must look to the Secretary of Agriculture for relief in the first instance. The pertinent facts of that decision quoted by the Court of Appeals are (Tr. 42, 43):

> "The procedure devised by Congress explicitly gave to an aggrieved handler an appropriate opportunity for the correction of errors or abuses by the agency charged with the intricate business of milk control. In addition, if the Secretary fails to make amends (fol. 44) called for by law the handler may challenge the legality of the Secretary's ruling in court. Handlers are thus assured opportunity to establish claims of grievances while steps for the protection of the industry as a whole may go forward. Sections 8a (6) and 8c (15) thus form a complementary procedural scheme. Contrariwise, it would make for disharmony to extrapolate from these provisions of the statute the right to consider independently in a proceeding by the Government for the enforcement of the Secretary's

order, questions for which Congress explicitly furnished the handler an expert forum for contest with ultimate review by a district court." • • •

"Congress has provided a special procedure for ascertaining whether such an order is or is not in accordance with law. The questions are not, or may not be, abstract questions of law. Even when they are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the milk industry. And so Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture."

At this point the petitioner states the simple question that was presented to the Circuit Court of Appeals: Does Section 8c (4) of the Act make it mandatory for the Secretary of Agriculture to set forth in a milk order, the price, which he has ascertained, that will give milk a purchasing power equivalent to the purchasing power during the base period, as required by Section 8c (18)? The answer to that question requires a construction and interpretation of the statute and nothing more. It is not an abstract question of law nor is it a question of law "arising out of, or entwined with, factors that call for understanding of the milk industry." Assuming for the moment that the Secretary did find the parity price, without any reference to the manner in which he arrived at the same, was it his statutory duty to publish the same in the Order?

The foregoing excerpts from the *Ruzicka* decision referred to by the Court of Appeals in the instant case can not be isolated or read without reference to the remainder of the opinion. A careful reading and analysis of the decision in the case of *United States* v. *Ruzicka* does not justify the Government's reliance thereon. The defense the Ruzickas interposed to the complaint of the plaintiff for a

money decree, as set forth by the Supreme Court in its opinion, is that the Administrator's demand "was based upon faulty inspection of their accounts and improper tests of their milk and milk products." *That* was the *issue* in the District Court. The Supreme Court then observed that "The District Court ruled that 'the defendants having failed to avail themselves of the administrative remedy provided by said Act may not raise *such issues of fact* before this Court.' On the *issue of fact* thus *limited,* the District Court granted the Government's motion for judgment on the pleading." (Italics supplied.)

It is the contention of counsel for the defendant in the instant case that the opinion of the Court in the *Ruzicka* case and its ultimate decision are grounded upon *this issue.* A fair examination of the opinion, the language used, and the ideas expressed therein can lead to no other conclusion. By this statement, counsel mean to say that questions of law regarding the validity or constitutionality of the Order, or of certain sections of the Act, do not have to be submitted to the Secretary of Agriculture for his decision, at any time or in any proceeding.

The Supreme Court states: "The procedure devised by Congress explicitly gave to an aggrieved handler an appropriate opportunity *for the correction of errors or abuses* by the agency charged with the intricate business of milk control. In addition, if the *Secretary fails to make amends called for by law,* the handler may challenge the legality of the Secretary's ruling in Court. Handlers are thus assured opportunity to establish *claims of grievances* while steps for the protection of the industry as a whole may go forward. Sec. 8a(6) and Sec. 8c(15) thus follow a complementary procedural scheme. Contrariwise, it would make for disharmony to extrapolate from these provisions of the

Statute the right to consider independently, in a proceeding by the Government for the enforcement of the Secretary's Order, *questions* for which Congress explicitly furnished the handler *an expert forum* for contest with ultimate review by a District Court." (Italics supplied.)

Two important ideas must be extracted from the foregoing excerpt. One is that a handler must appeal to the Secretary of Agriculture for the correction of agency errors or abuses, which *may be corrected* by the Secretary, or by a District Court if the Secretary fails to make the proper amends. It follows that if an Order, or a provision thereof, is successfully challenged before the Secretary on some constitutional question, or because the Order is in conflict with the Act, the Secretary can make no correction or amends. The Order must fail.

The second idea imbedded in the language of the foregoing excerpt is that a handler may not assert in a proceeding brought under Sec. 8a, "*Questions* for which Congress explicitly furnished the handler an *excerpt forum for contest.*"

Certainly, inquiry follows as to what questions must be submitted to this expert forum; and on what matters or questions is this forum an expert. Must questions of law be first submitted to this forum? And is this forum an expert on questions of law? Further analysis asks whether the Secretary of Agriculture is a more expert forum to which questions of law must be submitted than any District Court. Did the Supreme Court intend, in the *Ruzicka* decision, to delegate to the Secretary of Agriculture, and his employees and agents, the right to determine questions of law, such as the constitutionality of a Milk Marketing Order, or whether an Order is in conflict with the Agricultural Marketing Agreement Act of 1937? If so, then the

Supreme Court has approved a Congressional delegation of judicial power to the Executive Branch of the Government.

Further examination of the language used by the Supreme Court indicates emphatically that it never intended to go that far, and, in fact, limited its decision to the precise issue before it, which was: Where must a handler seek relief from mistakes and errors made by the Market Administrator in the computation of the latter's claim for money alleged to be due under a Milk Order? The Supreme Court holds, and properly so, that *such* complaints must be first presented to the Secretary of Agriculture. The Court, in the last paragraph of its opinion, notes: "And so we deem it desirable, in a case *like this, to hug* the shore of the *precise problem* before us in relation to the provisions of the particular Act immediately relevant." (Italics supplied.) And further, "*And so we are not called upon to decide what powers inhere in a court of equity, exercising due judicial discretion, even in a suit such as was here brought by the United States for the enforcement of an Order under Sec. 8a*" (Italics supplied.) The last excerpt seems to have been uttered in connection with the propriety of a motion made in the District Court for a stay, pending disposition of the Ruzickas' petition before the Secretary of Agriculture; but both excerpts, when read together, indicate most strongly, that the only question decided by the Supreme Court was whether or not purely technical questions arising in an Administrator's claim for moneys due under the Act, may be litigated in a proceeding brought under Sec. 8a(6) of the Act, or whether it must first be submitted to the Secretary of Agriculture under the proceedings provided for in Sec. 8c(15).

The principal question presented by the defendant is whether or not the Secretary of Agriculture obeyed the

mandate of Sections 8c(4) and 8c(18) of the Marketing Agreement Act of 1937. This is not a question of law arising out of, or entwined with factors that call for understanding of the milk industry. It merely calls for a pure interpretation of the statute and poses the question: Is it mandatory to publish the price that will give milk a purchasing power equivalent to its purchasing power during the base period? This involves nothing but statutory construction and interpretation, an activity which is within the *exclusive* jurisdiction of the Courts.

This Court has heretofore considered questions of statutory interpretation of the Marketing Agreement Act in the cases of *United States* v. *Wrightwood Dairy Company*, 315 U. S. 110; *U. S.* v. *Rock Royal Co-op.*, 307 U. S. 533, and *U. S.* v. *Hood and Sons*, 307 U. S. 588.

Particularly applicable language is used by the Supreme Court in the case of *Stark* v. *Wickard*, 321 U. S. 288, 309, where the Court said:

> "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits courts to participate in law enforcements entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by statutes establishing courts and marking their jurisdiction. * * * Under Article III, Congress established Courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power.
>
> "* * * *Technical details of the milk business are left to the Secretary and his aides.*" (Italics ours.)

To hold unequivocally that the Secretary of Agriculture and his many employes, to whom he delegates a great amount of his work, may encroach upon the judiciary by congressional legislation committing to him the construction and interpretation of statutes is to violate the Constitution of the United States which authorizes the creation of Courts for that specific purpose. To hold Section 8c(15) constitutional, this Court must withdraw from the Secretary of Agriculture the right to construe and interpret statutes enacted by Congress because "these august functions" should be entrusted by society, "only to those who are equal to their demands."

Notwithstanding that the Emergency Price Control Act gave to the Emergency Court of Appeals exclusive initial jurisdiction to pass on the validity of price regulation, the Supreme Court permitted the defendant to attack the constitutionality of the said Act in an action brought in the District Court by the Administrator to enjoin the sale of timber over the ceiling price. *Case* v. *Bowles,* 327 U. S. 92.

If the direction to publish the purchasing power of milk in the base period within the four corners of Order No. 41 is mandatory, then it becomes an idle gesture to petition the Secretary of Agriculture to correct the omission. The order is void; life cannot be breathed into it *nunc pro tunc* as of the date of its promulgation.

It seems unquestioned that Congress intended that this important purchasing power price be published in the Order. Section 2(2)(b) of the Agricultural Marketing Agreement Act of 1937 provides that it is the policy of Congress to protect the interest of the consumer by "authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to

establish in sub-section 1 of this Section." Unless the purchasing power price is published in the Order, as directed by the Act, it is impossible for Congress, for a handler, for the producer or for the public to determine whether there has been compliance with the Congressional policy as declared in Section 2(2)(b) of the Act. The purchasing power price is the one vital fact that determines whether or not the minimum price of milk as fixed by the Secretary of Agriculture is proper.

The Honorable Justice Frankfurter, who wrote the opinion in the *Ruzicka* case, could not have intended to commit a pure question of statutory construction and interpretation to the Secretary of Agriculture in the first instance. This conclusion must be drawn when one reads the learned and interesting article, written by him, on the reading of Statutes in the May, 1947 issue of the Columbia Law Review, Volume 47, pages 527-546. Therein he said:

> "When we talk of statutory construction we have in mind cases in which there is a fair contest between two readings, neither of which comes without respectable title deeds. A problem in statutory construction can seriously both courts when there is a contest between probabilities of meaning. * * * Anything that is written may present a problem of meaning, and that is the essence of the business of Judges in construing legislation. * * * (p. 529) When the Judge, *selected by society to give meaning to what the legislature has done,* examines the statute, he does so not in a laboratory or in a classroom."

Justice Frankfurter concludes his article with these significant words (p. 546):

> "Fit legislation and fair adjudication are attainable. The ultimate reliance of society for the proper fulfillment of both these august functions is to entrust them only to those who are equal to their demands."

Nowhere, however, has the Secretary included in the order a finding by him of the price that will give milk a purchasing power equivalent to its purchasing power during the base period, in accordance with Section 2 and Section 8e of the Act. Government counsel may make a distinction between the words "shall ascertain" and the word "finds"; in other words, may here assert because the Act requires the Secretary to *ascertain* the price of milk, in accordance with Section 2 and Section 8e, that will give it a purchasing power equivalent to its purchasing power during the base period, that no finding of such fact must be published in the Order. True, the word "find" is not used but its exact synonym "ascertain" has been used; and the word "ascertain" has been judicially defined to be equivalent to the word "find."

> "Ascertain means to make certain, clear or definitely known; to find out with certainty; determine; insure as a certainty. *United States* v. *Foster* (C. C. A. Ia.), 137 F. 2d., 3, 7; *Quinn* v. *Commissioner of Internal Revenue,* (C. C. A. Tex.), 111 F. 2d., 372, 373; *Commissioner of Internal Revenue* v. *Burdette,* 69 F. 2d., 410, 411. 'Ascertain' means to 'find out'. *Coons* v. *Coons,* 106 Va., 572, 56 S. E. 576; Webster's Dictionary."

Black's Law Dictionary, 3rd ed., defines the word "ascertain":

> "Firstly to fix; to render certain or definite; to estimate and determine; to clear of doubt or obscurity; to find out by investigation" (citing *U. S.* v. *Carver,* 43 S. Ct., 181, 182; 260 U. S. 482; 67 Law Ed. 361.)

The same authority defines the word "find", as follows:

> "To discover; to determine; to *ascertain* and declare."

The only way the Congressional policy, intended to protect the consumer, can be effectuated, is by the publication

of this price. Section 2 of the Agricultural Marketing Agreement Act provides that "It is hereby declared to be the policy of Congress * * * to authorize no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section."

Congress, in subsection (1), desired to establish prices to farmers at a level that would give agricultural commodities a purchasing power, with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period, August 1909 to July 1914.

Unless the Secretary publishes the price which he is required to ascertain and determine, by the clear direction of the provisions of Section 8c (18), it is impossible for the purchaser, the handler, or the consumer, to know whether the minimum price of milk, as fixed by the Secretary in the Order, truly reflects the purchasing power of milk equivalent to that of the base periods described in Sections 2 and 8e of the Act.

The demands of Section 8c (4) are not to be idly brushed aside. The requirement that the findings "specifically required by this section" shall be set forth in the Order is of the utmost importance. It is a familiar canon of statutory interpretation that every word of a legislative enactment is to be given force and effect, as far as reasonably practicable. No part is to be treated as immaterial or superfluous unless no other rational course is open. *Ex Parte Public Bank,* 278 U. S. 101, 104, 48 S. Ct. 73, L. Ed. 202.

It must be presumed that every word in Sections 8c(4) and 8c(18) has meaning and was inserted in the statute for a purpose.

With respect to the foregoing contention of the defendants, it is illuminating to note what the Supreme Court said

in the case of *Panama Refining Company* v. *Ryan*, 293 U. S. 388, page 432, 79 L. Ed. 446, 465, with respect to making a finding of facts as a condition precedent to an order. The Supreme Court said:

> "As the Court said in *Wichita R. & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, 59, 67 L. Ed. 124, 130, 43 S. Ct. 51; 'In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its functions. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. *When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking the order is ineffective.* It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We cannot agree to this.' Referring to the ruling in the *Wichita R. & Light Co.* case, the Court said in *Mahler* v. *Eby*, 264 U. S. 32, 44, 68 L. Ed. 549, 556, 44 S. Ct. 283: 'We hold that the order in that case made after a hearing and ordering a reduction was void for lack of the express finding in the order. We put this conclusion not only on the language of the statute but also on general principles of constitutional government.' We cannot regard the President as immune from the application of these constitutional principles. When the President is invested with legislative authority as the delegate of Congress in carrying out a declared policy, he necessarily acts under the constitutional restriction applicable to such a delegation." (Emphasis supplied.)

The Supreme Court further said:

> "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, *due process of law* requires that it shall appear that the order is within the

> authority of the officer, board or commission, and if that authority depends on *determinations* of fact, those determinations must be shown." (Italics supplied.)

In the case of *Thomas Paper Stock Co.* v. *Porter*, 328 U. S., 50, 53, it appears that the Taft Amendment to the Emergency Price Control Act precluded standardized commodity prices unless and until the Administrator "determined" that no other method of price control was practicable. In construing the effect of the word "determined" in the Taft Amendment, the Court stated at page 53:

> "For us the decisive consideration is that the Amendment was a rigorous limitation upon the powers of the Administration based upon the Congressional view that standardizations outstanding at the time the Taft Amendment was passed had not been authorized by the more general language of the original Act. • • • Accordingly, Congress laid down a specific requirement for the validity of prices based on standards, and a fair reading of the Amendment in the light of its history requires that the Administration *must indicate* that he has fulfilled this requirement. See *United States* v. *Baltimore & O. R. Co.*, 293 U. S. 454, 55 S. Ct. 268, 79 L. Ed. 587. It would hardly satisfy the restriction which the Taft Amendment placed upon the Administrator's power to standardize to allow him to continue situations which, as Congress thought, needed correction." (Emphasis supplied.)

It is interesting to note that the Supreme Court in construing the words "the Secretary shall ascertain", used the words, "The Secretary must have first *determined* the prices", *U. S.* v. *Rock Royal Corp.*, 307 U. S. 533, 577.

Respectfully submitted,

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